

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

EDMUND C. BOTHA,

Defendant.

Case No. 2:06-CR-00274-KJD-LRL

**ORDER**

Presently before the Court is Defendant's Motion for Release Pending Appeal (#134). The Government filed a response in opposition (#135) to which Defendant replied (#136).

**I. Background**

On September 15, 2008, Defendant was convicted of one count of Evasion of Payment of Income Taxes, in violation of 18 U.S.C. § 7201. Defendant was sentenced ten (10) months later on July 15, 2009, to sixty (60) months imprisonment, the maximum time allowed under the statute. Defendant reported to the Bureau of Prisons to begin his sentence on January 5, 2010.

Defendant filed an appeal of his conviction raising one issue: whether the Court should have given Defendant's proposed "willfulness" instruction which Defendant describes as his theory of the case. Defendant has now filed the present motion for release pending appeal.

1 II. Standard

2 Under federal law, there is a presumption against granting a defendant bail after conviction  
3 and sentencing. 18 U.S.C. § 3143(b). To obtain bail pending appeal, the convicted defendant must  
4 prove by clear and convincing evidence each of the following four factors: “(1) that the defendant is  
5 not likely to flee or pose a danger to the safety of any other person or the community if released; (2)  
6 that the appeal is not for purpose of delay; (3) that the appeal raises a substantial question of law or  
7 fact; and (4) that if that substantial question is determined favorably to defendant on appeal, that  
8 decision is likely to result in reversal or an order for a new trial of all counts on which imprisonment  
9 has been imposed.” United States v. Handy, 761 F.2d 1279, 1283 (9th Cir. 1985); 18 U.S.C. §  
10 3143(b)(A) &(B)(1998); Fed. R. Crim. P. 46(c); Fed. R. App. P. 9(c).

11 III. Analysis

12 The parties only contest whether Defendant’s appeal has raised a substantial question of law  
13 or fact. A “substantial question” is defined as a question that is “fairly debatable”, or “fairly  
14 doubtful” —and has been described as a question “of more substance than would be necessary to a  
15 finding that it was not frivolous.” Id. (citations omitted). In Handy, the Ninth Circuit noted that the  
16 term “‘substantial’ defines the *level of merit* required in the question presented” and the phrase  
17 “‘likely to result in reversal [or] and order for a new trial’ defines the *type of question* that must be  
18 presented.” United States v. Handy, 761 F.2d at 1280 (emphasis in original).

19 Here, the Court must deny the motion because Plaintiff has not raised a question that is fairly  
20 debatable or fairly doubtful. While Defendant is entitled to an instruction on his theory of the case,  
21 Defendant is “not entitled to [his] preferred wording of the instruction. A court may reject portions  
22 of a proposed theory of defense that merely rephrase explanations of the law adequately covered  
23 elsewhere in the instruction.” United States v. Warren, 25 F.3d 890, 895 (9th Cir. 1994). The  
24 Court’s instructions adequately covered Defendant’s proposed theory of defense. Accordingly, the  
25 Court denies Defendant’s motion.

1 IV. Conclusion

2 Accordingly, IT IS HEREBY ORDERED that Defendant's Motion for Release Pending  
3 Appeal (#134) is **DENIED**.

4 DATED this 31<sup>st</sup> day of January 2011.

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8 Kent J. Dawson  
United States District Judge  
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